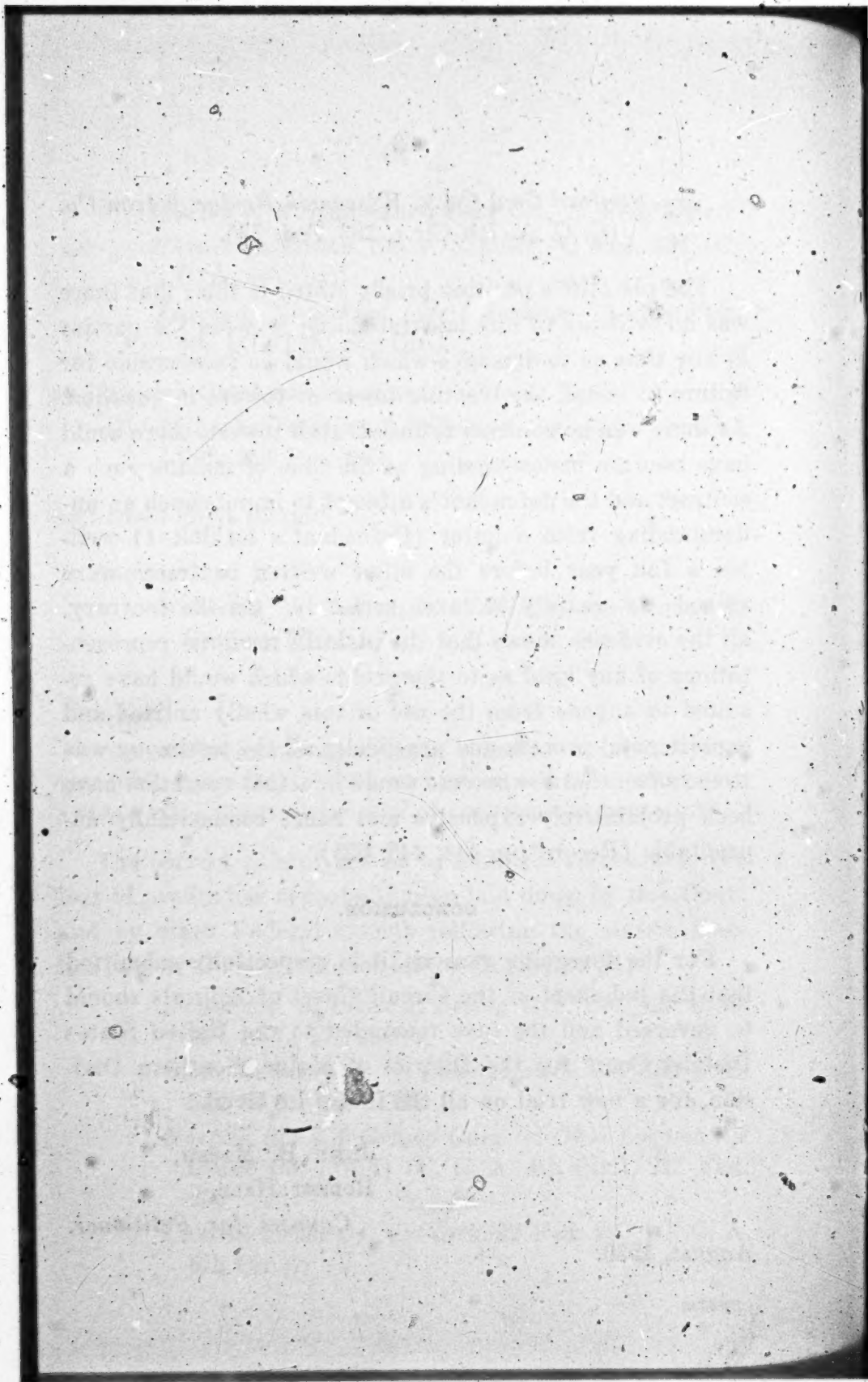

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 362.

GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

VS.

CHAMPLIN REFINING COMPANY.

ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ANSWER

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The defendant, Champlin Refining Company, a corporation, incorporated under the laws of the State of Maine, the defendant below and hereinafter referred to as the defendant, respectfully prays that the writ of

certiorari prayed for by the plaintiff herein, Gasoline Products Company, Inc., be denied.

STATEMENT OF FACTS

The plaintiff herein in its petition and brief has set forth a statement of the facts which statement is substantially correct, yet there are certain facts which the defendant claims are not covered by the statement made by the plaintiff which necessarily should be pointed out to more clearly advise the Court of the defendant's position.

As stated by the plaintiff, the case involves the correction of rulings of the Circuit Court of Appeals for the First Circuit relating to the conduct of jury trials in the United States Courts, though it is the contention of the defendant that the case does not call for an interpretation of the statutes of either the State of Maine or the State of Oklahoma, for the reason that the interpretation of the statutes of the State of Maine by the Circuit Court of Appeals of the First Circuit, in its decision in this case reported in the 29 Federal Reporter, 2nd Series, p. 331, is an adjudication whereby the plaintiff is precluded from raising the question of such interpretation for the reason it took no appeal from the Circuit Court of Appeals at the time of said adjudication.

That there is no occasion for this court to pass upon the interpretation of the statutes of the State of Oklahoma for the reason that the question involved there is whether or not interest should be allowed on a claim for damages and inasmuch as the

case was remanded by the Circuit Court of Appeals for the purpose of trying the question of damages only, interest being an item of the damage claimed, any error on the allowance of interest, if there was such, may still be corrected.

It is true the controversy relates entirely to a defense set up by this defendant in a plea of "counterclaim in set-off," the defendant not having contested its liability to pay the plaintiff's claim which was a claim for royalties earned of 10c per barrel on the throughput, a charge for the use of the Cross Cracking Process used in defendant's refinery at Enid, Oklahoma.

The defendant, in pleading its counterclaim in set-off, divided its counterclaim in two counts as set forth in plaintiff's petition herein. The two counts, however, cover but one cause of action, the first count alleging the existence of an oral contract and obligation (Record pp. 22 and 24) entered into between the plaintiff company and the defendant company, through a proposal made by Mr. C. H. Welling, vice-president of the plaintiff company and P. C. Keith, Jr., its selling agent, in the month of January, 1926, and accepted by Mr. Champlin as president of the defendant company at a conference with Mr. Harvison and Mr. P. C. Keith, Jr., selling agents for the plaintiff company on February 6, 1926, wherein Mr. Champlin agreed to install the Cross Cracking Process for cracking petroleum oil under the Cross patents and pay the 10c per barrel throughput as royalty upon the condition that the plaintiff, Gasoline Products Company, Inc.,

would install in connection therewith the vapor phase treating system to treat the cracked gasoline which was necessary to make it marketable.

The second count does plead a written proposal signed by Cross Engineering Company by P. C. Keith, Jr., vice-president, Mr. Keith being the selling agent who accompanied Mr. Welling and Mr. Harvison at the times of their negotiations with Mr. Champlin in January and February, and alleges further that said proposal was accepted by Mr. Champlin.

The Circuit Court of Appeals in its first opinion, 29 Federal, 2nd Series, pp. 336-7, has found that the written memorandum of February 6th set forth in Record p. 44 was in its nature but a restatement of the offer made by Mr. Welling and Mr. Keith to Mr. Champlin in January; that Mr. Champlin on February 6th committed the defendant to acceptance of the plaintiff's entire proposition conditioned only upon his financing. At the time Mr. Champlin accepted the proposal on February 6th made by the plaintiff for the vapor phase treating system, the only condition attached to the consummation of the agreement was that Mr. Champlin would be able to finance his company through the issue of bonds, and as the court says, "This condition was removed on February 26th, thus leaving the whole offer accepted" (Record pp. 68 and 71).

It will be borne in mind that when the defendant definitely selected the Cross Cracking Process as the one it desired to purchase, it did so by reason of the inducement (Record p. 56) held out by the plaintiff's agents that the plaintiff company would install at the

same time and in connection therewith, and royalty free, the vapor phase treating system so that the product from the cracking plant would be made immediately marketable; that the question of the necessity of a treating plant and the kind available had been discussed and regardless of the kind of cracking plant to be purchased, the Gray vapor phase process was discussed and recommended, but, on this process, the defendant company would have been compelled to pay 6c per barrel, finished product, as a royalty, and upon an agreement with the plaintiff to install its Cross vapor phase system of treating the unfinished gasoline, royalty free, a discussion of the Gray process was ended.

There was some contention that Mr. Keith represented the Cross Development Corporation, one of the several Cross Companies, instead of the Cross Engineering Company whose name he signed to the letter outlining the proposal (Record p. 44), and also that he did not represent the plaintiff, Gasoline Products Company, Inc., but the defendant contended throughout the trial of the case that by reason of the fact that Mr. Welling was vice-president of the Gasoline Products Company, Inc., the plaintiff herein, Mr. Keith its selling agent, and later Mr. Harvison admittedly its selling agent, and in the light of the letter embodying the Welling proposal written by Mr. Keith reciting that he, Keith, "was directed by Mr. C. H. Welling, Vice-President of the Gasoline Products Company, Inc.," to outline the proposition, the defendant claims it made sufficient proof that the letter outlining the proposition to

install the treating system was the act of the plaintiff company, and furthermore, that while the written memorandum refers to the treating system as "installation of a Cross vapor phase system treating tower," yet the evidence shows (Record pp. 81-82, 92 and 158) that the oral agreement was that the defendant company should have a treating system of the same capacity as the cracking plant so that the cracked unfinished gasoline would be immediately treated for market.

It developed in the trial of the case (Record p. . . .) that at or near the time the plaintiff company refused to install the treating system and urged the defendant company to install the Gray treating system, that the Kellogg Company of which Mr. Harvison was vice-president, and which company was selling agent for the plaintiff's cracking process (Record p. 295), and which company through the plaintiff secured the contract for construction of the Cross cracking plant for defendant (Record p. 56), had made some kind of an agreement with Mr. Gray whereby it would urge the installation of his patent treating system instead of that of the Cross, notwithstanding about that time, the plaintiff had sent a Mr. Schofield, patent attorney from Kansas City, Missouri, to convince Mr. Champlin, president of the defendant company, that the proposed Cross vapor phase system treating tower was not an infringement upon the Gray tower as Gray contended (Record p. 58).

The record does not disclose and it is impossible to fix exact dates, but on the 13th day of May, 1926, when the work on the contract for construction of the

cracking plant was being advanced by the Kellogg Company who had the contract of construction, Mr. Champlin for the defendant company, realizing that no vapor phase treating system was being installed, wired the plaintiff for definite information when he might expect the complete plans and specifications for the vapor phase treating towers (Record p. 82). This started the controversy as to whether or not the Gasoline Products Company, Inc., was to furnish this treating system, it contending Mr. Champlin never accepted its proposal to install the treating plant royalty free, and this being near the time when Mr. Harvison for the Kellogg Company made some arrangement with Mr. Gray to take over the sales rights for Gray's process (Record pp. 313 and 315). This is about the time that Mr. Keith and others in behalf of the plaintiff were so insistent on Mr. Champlin abandoning his demand for the royalty free treater and installing the Gray treater (Record p. 115) which carried with it a royalty of 6c per barrel on the finished product, contending at the same time (Record pp. 115 and 147) that the expense of operation of the Cross treater was prohibitive or that it wasn't feasible commercially, and this was after Mr. Gray and Mr. Harvison had had a difference at Enid, Oklahoma, when both were trying to interest Mr. Champlin in the sale of their respective patent processes (Record p. 449).

Mr. Champlin for his company insisted on the installation of the Cross treating system as was the contract and also insisted that the installation was to be of sufficient capacity whether one tower or three,

(Record pp. 81-82, 92 and 158), to cover the output of the cracking plant, and after the failure of the plaintiff to install the Cross treating system and the construction of the cracking plant was finished, the defendant company commenced negotiations for the construction of a treating system based on a certain German patent which had expired (Record pp. 69 and 70), the plan of which came into its hands through Mr. Schofield, the patent attorney from Kansas City, who was sent by the plaintiff to convince Mr. Champlin that Gray's patent was copied after the German, and that the Cross patent was not an infringement of the Gray (Record p. 58).

After negotiations with the Kansas City Structural Steel Company which at first refused to construct the treating towers because of a warning from Gray that it would be an infringement, the plaintiff company finally erected treating towers patterned after the old German patent ready for use in the month of February, 1927, but the cracking plant had been completed since the month of September, 1926 (Record p. 181), and by reason of not having the treating plant ready at the time the cracking plant was ready for operation, there was a delay of about five months and a half in treating the unfinished gasoline and preparing it for market.

The loss occasioned by this delay constitutes the principal item of damage claimed by the defendant, it being the contention of the defendant that it lost its profits on the sale of the finished gasoline, and that this loss was not only susceptible of calculation as

required by the law, but was in fact by it calculated to a reasonable certainty and to the degree the law required to justify a recovery (Record pp. 240-255 inc., and 692-694 inc.). Moreover, when the defendant purchased the license to use said cracking process from the plaintiff, the profits, defendant claims, were within the contemplation of the parties, plaintiff's agent having presented to Mr. Champlin, president of the defendant company, detailed estimate of the profits based on refining the same quality of oil as the defendant company was refining which estimate included the cost of treating the unfinished gasoline (Defendant's Exhibit 1, Record pp. 716-725 inc.). Exhibit 1 includes what the plaintiff company termed guaranteed results (Exhibit 1, Record p. 719). On the following pages the recovery of gasoline was reduced to dollars and cents showing a monthly guaranteed yield of profits on the same capacity as the Champlin cracking plant, 4000 barrels, of $77,965.00 using gas oil as charging stock and $75,766.00 monthly using kerosene distillate as charging stock, both on an investment of $455,000.00.

The jury returned a verdict as set forth in plaintiff's petition herein, that is, for the total amount of the royalties earned which was not denied, including interest, of $61,530.56 and a verdict in favor of the defendant on its account in set-off of $40,980.56, leaving a balance due the plaintiff in the sum of $20,449.97 on which interest was calculated at the time judgment was entered making a total judgment of $23,032.85. The verdict by the jury does not imply a belief on the

part of the jury in the existence of some contract for treating apparatus, but it is conclusive that the jury was convinced and did find that such a contract existed and that it was violated and broken by the plaintiff and it did not become necessary and was not necessary for the jury to indicate whether its verdict was rendered on the first count or on the second count of defendant's counterclaim in set-off, as both counts include one continuous transaction, combining a number of circumstances which constituted a proposal and an acceptance by the defendant, thereby consummating a contract.

The plaintiff in its Petition for a Writ of Certiorari herein filed has correctly stated the issues raised by the parties in the second appeal which, briefly stated, were, on plaintiff's exceptions:

(1) Whether on all the evidence the Court should have left to the jury the question as to the existence of the contract and its breach by the plaintiff.

(2) Whether on all the evidence the Court should have left to the jury the question as to whether any loss was sustained by the defendant as a result of the alleged breach of such contract.

The only issue raised by the defendant on its appeal, both parties having appealed from the trial court to the Circuit Court of Appeals, was the exceptions taken to the judge's charge to the jury, and the verdict was set aside by reason of error of the trial judge in his charges as to the degree of certainty of damages recoverable for lost profits, and the case was remanded for a new trial on the question of damages

only. This was the result of a second trial of this case before the Circuit Court of Appeals as reported in the 39 Federal 2nd Series, p. 521.

The plaintiff in its petition sets forth five specifications of errors and six reasons why the prayer of its petition for a writ of certiorari should be granted.

This defendant says that the Circuit Court did not err in any particular to the prejudice of the plaintiff, and that the reasons set forth in said petition for granting the writ are not sufficient under the law and evidence as disclosed by the record, and the writ should be denied.

The defendant, therefore, respectfully prays the Court that the petition and prayer for the Writ of Certiorari of plaintiff be denied, and that the Court make such other and further order as to this Honorable Court may seem just and proper.

CHAMPLIN REFINING COMPANY,
By HORACE G. MCKEEVER,
HARRY O. GLASSER,
Counsel for Defendant.

Of Counsel:
WILLIAM S. LINNELL,
CARL C. JONES,
EMERY O. BEANE.

State of Oklahoma, County of Garfield, ss.

Horace G. McKeever, being duly sworn, says that he is the counsel for Champlin Refining Company, the defendant; that he prepared the foregoing answer and that the allegations thereof are true as he verily believes.

.....

Sworn to and subscribed before me this .... day of September, 1930.

.....
Notary Public.

BRIEF IN SUPPORT OF THE OPPOSITION TO THE PETITION FOR THE WRIT.

The petitioner has divided its argument in five subdivisions. We will discuss them in the order named in plaintiff's brief.

I.

Has the Circuit Court of Appeals for the First Circuit in remanding the case to the District Court for retrial "on defendant's damages only" abridged plaintiff's constitutional right to jury trial?

There will be no controversy over the fact that one cannot be deprived of a right to a jury trial as provided under the Seventh Amendment to the Federal Constitution, but the question here is on a specific case and whether or not in that specific case the plaintiff, by the case being remanded to be retried "on defendant's damages only," has been denied that constitutional right.

The plaintiff in its brief has cited, quoted at length from, and apparently relies on the case of *McKeon* v. *Central Stamping Company*, 264 Fed. 385. By referring to Shepard's Citator, we can find no place where this case has been approved, cited, or commented upon, and it stands alone as authority which, in relation to the facts, is very similar to the case at bar.

The Constitution preserves the right of jury trial and we submit to this Court that unless the plaintiff

has lost something which the Constitution preserves to it, the seventh amendment could not be violated.

There is in the case at bar issues which are severable, for instance:

First, was there a contract?
Second, was there a breach?
Third, was there damage sustained?
Fourth, how much?

The plaintiff has had a jury trial and by its verdict has determined there was a contract and that it was breached, and the Circiut Court of Appeals has agreed with the jury and has decided that the record sustains the jury on these two points.

In remanding the case for a trial "on defendant's damages only," the Circuit Court of Appeals has found that the jury, in arriving at the amount of damages, were not given the proper charge by the Trial Court and to the prejudice of the defendant, therefore, upon a retrial of the issue of damages only, the plaintiff loses nothing because that preserves the right of the plaintiff to show by competent evidence that there was no damage to the defendant, and it would not be precluded by such retrial from having considered all of the circumstances and facts which would tend to disprove the claim of the defendant that it had suffered a damage nor would it be precluded from offering its evidence to minimize the damage.

Plaintiff, in its brief, has anticipated the defense of the defendant by citing the different authorities upholding defendant's contention, among which it

cites the case of *F. E. Atteaux & Co.* v. *Pancreon Mfg. Co.*, 22 Fed. 2nd, 749. It will be observed that this is a later case than the McKeon case, *supra*, relied on by the plaintiff, and that the Circuit Court of Appeals of the First Circuit has not been convinced that its former opinion in the case of *Farrar* v. *Wheeler*, 145 Fed. 482, is erroneous, nor has it been convinced by the decision in the McKeon case from the Third Circuit that its former opinions were erroneous, and in the face of the McKeon case has handed down its opinion in this case showing the rule laid down in the case of *Farrar* v. *Wheeler, supra*, and *Calaf* v. *Fernandez*, 239 Fed. 795, cited in plaintiff's brief, both of which are from the First Circuit, is still adhered to.

The rules laid down in the above cases are expressed in the syllabus of each; Section 4 of the syllabus on rehearing in the Farrar case is as follows:

> "Rev. St. #701, provides that the Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a Circuit Court lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered or such further proceedings to be had by the Inferior Court as the justice of the case may require. Held, that where, in an action for injuries to an infant, the only error in the judgment related to the assessment of damages, the Circuit Court of Appeals had jurisdiction on reversal to limit a retrial to the question of damages."

It will be observed that this opinion is based on Revised Statutes, Section 701, referred to in plain-

tiff's brief, which section of the Revised Statutes was evidently overlooked by the learned judge of the Third Circuit in his opinion in the McKeon case, *supra*. The opinion does refer to Sections 721 and 914 of the Revised Statutes, which empowers the Federal Courts to follow state procedure. In reading the decision we are constrained to observe that while the learned Court defended the right of trial by jury, even to the extent of quoting early decisions which had to do with the sentiment connected with such right, we insist in the opinion the Court does not logically answer its own questions. The questions it asks itself are:

> "First, was the action of the Court below in following the New Jersey statute warranted by the federal statutes above cited?
>
> "And, secondly, if not so, was the restricted jury trial in the Court below one which deprived the defendant of its constitutional rights that 'the right of trial by jury shall be preserved?'"

The learned Court in undertaking to answer its own questions asks another question and then undertakes to answer the questions by citing numerous authorities which sustain the right of trial by jury, but none of which authorities have to do with the question of the right of a Court to remand a case for retrial on the question of damages only.

It is not convincing to us that it is necessary, as the Court says, to have twenty-four jurors pass on each question involved in the case in order to say that the complaining party has had a jury trial and been accorded his full constitutional rights. If twelve men have passed on a given disputed question in the case

which can be determined independent of other questions involved therein, though the court refers such other questions back to the jury for a new consideration or a new trial before twelve additional jurors, and this because the Trial Court erred on the one point only which caused the reversal as to that question, it could not be contended that the complaining party had been deprived of his right to trial by jury upon any disputed question in the case.

Therefore, while the facts in the McKeon case are somewhat similar to the case at bar, there is nothing in reasoning of the opinion or the authorities cited therein which touches the vital point involved here, and while the many authorities are cited, so far as we can read from the opinion we see no conflict between the authorities cited in the McKeon case and the opinion rendered in the various cases above referred to from the First Circuit.

We are not contending against the general rule as defined and set out in the cases, *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 67 L. Ed. 232, for in none of these cases is there decided the specific point in controversy here, but only the question of the right to have the jury pass upon the facts instead of the Court.

Plaintiff has cited the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, in support of its proposition that the rules of the common law as understood in England at the time

the Federal Constitution and seventh amendment were adopted, still obtain. With this argument we take no exception providing the case is such that it becomes mandatory under the law to apply the common law procedure.

Plaintiff also quotes at length from the opinion of Mr. Justice Van Devanter in this case but fails to differentiate between the Slocum case and the case at bar. Reading from the body of the opinion we find this language:

> "It becomes necessary, therefore, to consider whether that Court should have directed a new trial instead of a judgment on the evidence contrary to the verdict."

Quoting further from the opinion of the Court:

> "That what was done may be clearly in mind it is well to repeat that, while on the trial in the Circuit Court, the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence."

Here it will be clearly seen that this case can have no bearing upon or application to the case under consideration, for, it is plainly set forth that the Court invaded the province of the jury by entering a judgment on the evidence and contrary to the jury's finding, but in our case under consideration the Court

enters a judgment in conformity with the verdict of the jury and reverses the case for retrial only insofar as it covers the amount of damages, which could not be fairly ascertained by the jury on account of an erroneous instruction given to the jury by the Trial Court.

Mr. Justice Van Devanter enters into a lengthy and learned discussion of the right of trial by jury in the following pages of the opinion, in all of which we heartily concur.

We notice that plaintiff calls attention in its brief to the case of *Ballew* v. *United States,* 160 U. S. 187, 40 L. Ed. 388, wherein plaintiff suggests that some of the language used therein by the learned Chief Justice White must be reconsidered in the light of this Court's subsequent opinion in the case of *Slocum* v. *New York Life Insurance Company, supra.*

In reading the two cases, we are constrained to suggest that plaintiff has overlooked the specific point decided in the Slocum case, and that the opinion in the Ballew case in nowise conflicts with the opinion in the Slocum case.

The plaintiff has cited four other cases in its brief which is admitted sustain the rule established in the First Circuit, and which was applied in this case in remanding the case for a new trial on the one question of damages only.

The first case referred to is *Original Sixteen To One Mine, Inc.* v. *Twenty-one Mining Co.,* 254 Fed. 630.

In the body of the opinion the Court says:

"If the jury finds in favor of the plaintiff, and there is no dispute over the amount of the

recovery, it seems somewhat technical to deny to the Court the power to supply the omission from the undisputed facts, but such seems to be the law of the land. It does not follow from this, however, that a new trial must be granted as to every issue in the case. There was no uncertainty in the verdict, in so far as the jury found for the plaintiff, thus establishing its title to the vein and its right to damages. I see no reason why that issue should be submitted to another jury, with little likelihood that a different result would be obtained. The power of a Court to grant a new trial as to a single issue in a case is well settled in the State of California and in the Federal Courts. *San Diego Land, etc., Co.* v. *Neale,* 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Duff* v. *Duff,* 101 Cal. 1, 35 Pac. 437; *Estate of Everts,* 163 Cal. 449, 125 Pac. 1058; *Calaf* v. *Fernandez,* 239 Fed. 795, 152 C. C. A. 581."

The Court further commenting says that the case is one which peculiarly calls for the exercise of the discretion of the Court in awarding a new trial as to the single issue only. So it may be argued here, that is, the jury was misdirected by the charge of the Court as to one matter only, to-wit, the law covering the rule of damages, and since all other questions were submitted to the jury and the Appellate Court found no error in the instruction as to any other matter submitted, the same reason would apply for remanding the case for trial on the one issue in the First Circuit as it would in the Federal Court in California in the case last above cited.

The next case referred to in plaintiff's brief is the case of *Thorpe* v. *National City Bank of Tampa,*

274 Fed. 200, and is an opinion from the Circuit Court of Appeals, Fifth Circuit.

The learned judge in sustaining our contention in setting aside only a part of a judgment, where embracing different items, points out the statutory power of the Court to do so.

We believe the plaintiff has confused the power given by Federal statute to Courts to affirm, modify, or reverse any judgment brought before it for review, as he applies this statute to certain cases.

We agree with learned counsel for the plaintiff that the statutory provision cannot, and, in fact, does not take away the right of trial by jury, and if a question of fact has not been tried by a jury, then it follows that a Court could not deny that right by reason of the statutory provision, but if a separate item has been tried by the jury then the constitutional provision has been satisfied, and the plaintiff cannot be heard to complain of being denied its constitutional right.

We quote here a portion of the opinion of the Court in the above case as follows:

> "This Court has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require. *United States v. Ill. Surety Co.*, 226 Fed. 653, 664, 141 C. C. A. 409. Whatever may be the rule under the common law, where unmodified by statute, as to the power of a Court to grant a new trial in part, or as to a severable sum involved in the suit, we think there is no doubt as to the power of this

Court to set aside only a part of a judgment, where embracing different items, some of which are not in question. It is therefore quite clear that we are not required to set aside the judgment, so far as it awards the principal and interest on the note, and that the only question is: Should the judgment as to the $797.58, attorney's fees, be set aside? *Farrar* v. *Wheeler*, 145 Fed. 482, 486, 75 C. C. A. 386; *Insurance Co.* v. *Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358; *New York & C. Railroad Co.* v. *Estill*, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 292."

In plaintiff's brief the case of *Chicago, Rock Island & Pacific Railroad Co.* v. *Stephens*, 218 Fed. 535, is referred to as supporting defendant's contention. This decision is from the Circuit Court of Appeals, Sixth Circuit.

In this case the issues were submitted to a jury and thereafter the case was remanded to determine the facts on one issue only and the right to do this is set out in that portion of the opinion which we here quote:

"What disposition then should be made of the case? If, after verdict and judgment and while the case was in control of the Court below, the plaintiff had sought to amend her declaration by appropriate and definite allegations, and to show that the Rock Island Company was in truth a corporation created in accordance with the laws of Arkansas, she would no doubt have been given opportunity to cure the defect in question. *Mexican Central Railway* v. *Duthie*, 189 U. S. 76, 77, 23 Sup. Ct. 610, 47 L. Ed. 715. It is true that the Chief Justice said in the course of the opinion in that case that if the petition had remained as it was originally framed, and the case had been car-

ried to the Circuit Court of Appeals, that Court 'would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend;' but the orders of reversal in the cases there referred to seem to have been to remand the causes 'for further proceedings,' and not in terms for new trial (and see *Denny* v. *Pironi*, 141 U. S. 121, 124, 11 Sup. Ct. 966, 35 L. Ed. 657, and citations); and it is not perceived why the reversal of the judgment should necessarily include the setting aside of the verdict. Permitting the verdict to stand in a case like this and reversing the judgment, only to remand the cause with permission to frame and try an issue of fact with respect alone to diversity of citizenship, would no more deprive the defendant of the right of trial by jury than was done in the Duthie case, just cited (*Parker Washington Co.* v. *Cramer*, *supra*, 201 Fed. 880, 120 C. C. A. 116; *Toledo Traction Co.* v. *Cameron*, 137 Fed. 48, 54, 55, 69 C. C. A. 28 (C. C. A., 6th Cir.); *McEldowney* v. *Card*, (C. C.) 193 Fed. 475, 483, by Sanford, District Judge); and the trial court could then exercise its powers under Section 954 of the Revised Statutes (Comp. St. 1913, No. 1591) as completely as the trial court did in the Duthie case. Such a course as this is sanctioned even in criminal cases, where the sentence is erroneous. *Ballew* v. *United States*, 160 U. S. 187, 202, 203, 16 Sup. Ct. 263, 40 L. Ed. 388; *Haynes* v. *United States*, 101 Fed. 817, 820, 42 C. C. A. 34 (C. C. A., 8th Cir.); *Whitworth* v. *United States*, 114 Fed. 302, 305, 52 C. C. A. 214, (C. C. A., 8th Cir.); *Mitchell* v. *United States*, 196 Fed. 874, 878, 116 C. C. A. 436 (C. C. A., 9th Cir.)."

The fourth case cited by plaintiff and above referred to is the case of *Fentress Coal & Coke Co.* v. *Elmore*, 240 Fed. 328.

This case is also from the Circuit Court of Appeals, Sixth Circuit, and in passing on the question involved the Court says:

> "The application for rehearing also points out that the opinion inaccurately stated certain details of the injury; but we find no error material to the result.
>
> On its merits the application is denied. The order of affirmance will be set aside, and the judgment below, but not the verdict, is reversed, without costs of this Court to either party; and the case will be remanded for determining the question of jurisdiction. If, in manner to be determined by the Court below, plaintiff shall properly amend his declaration and establish the necessary diverse citizenship existing when the suit was commenced and when the removal was made the judgment will be reentered; if jurisdiction be not thus shown the case will be remanded to the state court."

Counsel has further called attention in plaintiff's brief to the early English and American cases, but none of these change the rule which is conceded, but over which the controversy is solely to the application of the rule.

In the case of *In Re Walter Peterson*, 253 U. S. 300, 64 L. Ed. 919, this Court in an opinion by Mr. Justice Brandeis says:

> "The command of the 7th Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained."

citing *Walker* v. *New Mexico & S. P. R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837, 841, and *Twining* v. *New Jersey*, 211 U. S. 78, 101, 53 L. Ed. 97, 107.

Further quoting, the opinion says:

> "It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

Plaintiff discusses the present case from the viewpoint that the issue of damages is not severable, or capable of retrial alone. If the rule established by the former decision of the Circuit Court of Appeals in the First Circuit, and the other courts as pointed out herein, are to be sustained, then the issue of damages is severable. Plaintiff admits, when it says in its brief that:

> "It may fairly be inferred that the jury's verdict must have been based upon a finding (a) that there was a contractual relation between defendant and plaintiff; (b) that said contract was breached by the plaintiff; and (c) that the defendant suffered damages certainly and proximately flowing from said breach,"

that the issues are severable, and no other conclusion could be arrived at but that the jury did find by its verdict that there was a contract and the contract was breached, and in this particular case the contract found to be breached was to furnish a vapor phase

treating system, royalty free and to determine separately the question of a breach and its violation; it is not necessary for the jury to determine what items of damage resulted from such violation, therefore, the items of damage are severable.

The evidence here shows a calculation of lost profits based upon the representation by plaintiff with reference to the return in profits should the defendant purchase its patented cracking process, and the calculations for lost profits made at the trial are based absolutely upon the figures and method of calculation furnished by the plaintiff itself when it used such figures as an inducement to the defendant to purchase the right to use its process and in the item of lost profits, it so happens that the item of damage is such that it is not only severable, but the plaintiff itself severed it by its representations when it made the sale (Record pp. 716 to 724, Exhibit 1).

All the items mentioned by plaintiff in its brief, page 46, flow directly from the breach of the contract, and each item is a severable item as to the amount of damage, and each item together with the item of lost profits comes within the issues of a retrial granted by the Court for the purpose of determining the damages only, and the plaintiff is not precluded from offering its evidence against each and every one of these items and also its evidence in minimization of any damage which the defendant claims it sustained by reason of the breach.

We commend the diligence of counsel for plaintiff in calling attention in his brief to the adjudicated

cases and upon following him in a very exhaustive search we are unable to find any further adjudicated cases which support the defendant's contention so convincingly as those cited by plaintiff and herein quoted.

We submit to this Honorable Court that the Circuit Court of Appeals, in remanding the case for retrial on damages only, is within the rule and such action is not a violation of the Seventh Constitutional Amendment, and on this ground the Petition for Writ of Certiorari should be denied.

II.

Has the Circuit Court of Appeals for the First Circuit erred in applying the Maine law of set-off?

In the outset we will not concede that it is necessary for the Federal Court to adhere absolutely to the statutory law of Maine with reference to the defendant's right to file its counterclaim in set-off in this case.

Defendant contends, as both a matter of fact and a matter of law, that plaintiff cannot here question the defendant's right of set-off inasmuch as it permitted this question to be adjudicated in the first appeal taken to the Circuit Court of Appeals in this case (29 Fed. 2nd 331).

In that case which was not appealed from by the plaintiff the Court said,

> "It is clear that the defendant's right of counterclaim or set-off is not to be determined on any narrow or technical construction of the Maine statute as to set-off."

The Circuit Court of Appeals in this first opinion, applied some permissible principles of equity in a jury case when it said,

> "We think the same principle is, on this record, here applicable; and justice demands such procedure, even if the defendant's damages are not technically ascertainable by calculation. This case falls under the doctrines clearly laid down by the Supreme Court of New Hampshire in *Johnson* v. *White Mountain Creamery Ass'n*, 68 N. Y. 437, 36 A. 13, 73 Am. St. Rep. 610. We find nothing in the decisions of the Supreme Court of Maine inconsistent with the result there reached."

Thereupon, the Court having adjudicated the defendant's right to file its counterclaim and been heard upon the same, and such adjudication not being appealed from by the plaintiff, in this case it became fixed and cannot now be raised as a ground for granting a Writ of Certiorari.

In the opinion on the first appeal the Court quotes from Chief Justice Fuller in the case of *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, as follows:

> "The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject."

Therefore, in applying a statute as in this case with reference to procedure where the Court has said that it is, "really a requirement of substantive justice," the Court has a right to exercise its equity powers in asserting a liberal interpretation of the right of set-off.

The Court also calls attention to the fact that the Judicial Supreme Court of Maine has recognized the same doctrine and cites the cases of *Rodick* v. *Pineo*, 120 Me. 160, 113 A. 45, and *Peterson Oven Co.* v. *Fickett*, 121 Me. 413, 117 A. 575.

In the case of *Morse* v. *Moore*, 83 Me. 473, 22 A. 362, referred to in the opinion of the Court, we find this language approving the former case of the Maine court in *Rogers* v. *Humphrey*, 39 Me. 383:

> "It is there held that 'when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit.'"

The Court goes on to say that in fact the same principle is sustained in *Peabody* v. *Maguire*, 79 Me. 572.

In the case of *Roberts* v. *Cooper*, 61 U. S. 467, 15 L. Ed. 969, the rule is laid down with reference to adjudication where a case has been appealed on the second writ of error.

We quote the following from the syllabus:

> "After a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate.
>
> None of the questions which were before the Court on the first writ of error, can be reheard or examined upon the second."

It is our conclusion then that the matter of procedure has not only been adjudicated against the plain-

tiff; but that the decision in the first instance was correct and, indeed, it seems to be the only sensible holding for the Federal Courts since the matter of the right of set-off is more than mere procedure, but it involves a substantive right to the defendant, and, furthermore, the plaintiff has not been prejudiced but has had its day in court with the same rights preserved as if defendant had instituted a separate action against plaintiff for its damages sustained.

The discussion set forth in the first opinion in this case, a part of which we have here quoted, seems to be the one way in which defendant may have all of its rights fully preserved while plaintiff is not prejudiced thereby, and the opinion is also in conformity with the later tendency of all courts and especially our Federal Courts to look more to substantive justice than to technical rules of procedure which is as it should be, and this is done not only in courts of equity, but in law courts in the exercise of their equitable jurisdiction.

In conclusion, in Section II of the brief, we call the Court's attention to the rules as laid down in Simkins Federal Practice (R. E.) at page 984:

> "An appellee may file a cross appeal at the same time with appellant's appeal, or he may file it at any time within the time limit, but the same rules regarding assignments of error and procedure in appeals must be pursued, without reference to appellant's appeal."

On the first appeal the plaintiff did not take advantage of this rule and therefore, as a matter of fact, there being no cross appeal, the matter of the pro-

cedure was adjudicated by the trial court by overruling the plaintiff's Motion to Strike the defendant's Counterclaim in Set-off, however, the appellate court passed on the same question sustaining the lower court and no appeal was taken by plaintiff from the decision of the appellate court.

The plaintiff, therefore, is not entitled to be granted its Writ of Certiorari on its second ground.

III.

Did the court err in applying the Oklahoma law as to interest on unliquidated damages?

Since the matter of interest is an element of damage which the Court must reconsider in a retrial of the question of damages only, the matter of interest if in error, will no doubt be corrected at a retrial of the issue of damages, and the plaintiff has lost nothing and no final adjudication stands against it on this question.

IV.

Did the evidence warrant the submission of the case to the jury?.

The evidence as disclosed by the record is so convincing and so conclusive as to each material question necessary to establish the contract, its breach, and the resultant damage, we do not believe that counsel for plaintiff seriously contend for this point.

We are so convinced from the evidence that the Court here will adopt our view as did the Circuit Court of Appeals, that we desire to rely on that conviction and submit the record.

V.

Did the Circuit Court of Appeals err in holding that the defendant did, on the weight of the evidence, make out a claim for substantial sum of lost profits as damages?

The Petition for the Writ of Certiorari should be denied on this ground for the reason that the verdict of the jury as to damages which includes the question of lost profits, has been remanded for retrial and all the rights of the plaintiff can be saved in the retrial, and as no final judgment has been entered against it for damages, it has lost nothing and we deem it here only to burden the record to enter into an argument of when and how lost profits may become a proper element of damage.

The record in this case speaks for itself, and since the plaintiff delivered to the defendant such an elaborate computation of anticipated profits if defendant would only purchase plaintiff's patented cracking process, the defendant, would, without doubt, realize all of these profits as set forth in plaintiff's computation. (See Record Exhibit 1.)

Conclusion.

We respectfully submit to this Honorable Court that the plaintiff's Petition for Writ of Certiorari should be denied.

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